FILE COPY

FEB 15

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 602.

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

v.

DEMETRIOS P. VIGLAS,
Respondent.

BRIEF FOR THE RESPONDENT.

HARRIS J. BOORAS,
GEORGE C. ELIADES,
JOHN A. EDGERLY,
Attorneys for Respondent.

INDEX.

	PAGE
Jurisdiction and Travel of the Case	1
Additional Facts of the Case, and Question Presented	2
Points and Authorities	3
1. As to the point that: "The case is governed by the decision of this Court in the recent case of *Mobley* v. *New York Life Insurance Company*, 295 U.S. 632."	3
2. As to the point that: "The doctrine of anticipatory breach, which alone could sustain the respondent's petition, does not apply to the case."	8
3. As to the point: "Aside from the rules of law heretofore discussed, it would be unjust to permit the recovery sought by the respondent."	11

TABLE OF AUTHORITIES CITED.

TABLE OF CASES CITED.

Anson on Contracts, Am. Ed. Ch. XV, pp. 442, 445	10
Central Trust Co. of Ill. v. Chicago Auditorium Ass'n. 240 U.S. 541	8
Cutter v. Gillette, 163 Mass. 95	10
Day v. Conn. General Life Ins. Co., 45 Conn. 480	8
Dunbar v. Dunbar, 190 U.S. 340	8
Eastern Tenn. etc. R.R. v. Taub, 7 Lea 397	10
Equitable Life Assurance Society v. Pool, 71 S.W. (2d) 455 (Ark. 1934)	6
Fair v. Kohler Die & Specialty Co., 228 U.S. 22	2
Federal Life Insurance Co. v. Rascoe (C.C.A. 6) 12 F. (2d) 693	8
Indiana Life Endowment Co. v. Reed, 103 N.E. 77	6, 8
Kimel v. Missouri State Life Ins. Co., 71 F (2d) 921	2

PAGE

Lovell v. St. Louis Mutual Ins. Co., 111 U.S. 264 8

Millbum v. Royal Union Mutual Life, 234 S.W. (Mo.) 378 6

Minn. Mutual Life v. Marshall, 79 Fed. (N.D.) 977 6

Mobley v. New York Life Insurance Co., 295 U.S. 632 3

O'Neill v. Supreme Council American Legion of Honor, 57 Atlantic (N.J.) 463 8

Parker v. Russell, 133 Mass. 74 8

Pierce v. Tenn. Coal, Iron, etc. Co., 173 U.S. 1 8

Restatement Law of Contracts, Am. Law Institute, Rep. Samuel Williston. Tentative Draft No. 7, explanatory notes on contracts March 1, 1930, 14 Harvard Law Review 432 10

Robins v. Travelers Insurance Co., 269 N.Y.S. 841 6

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 602.

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

v.

DEMETRIOS P. VIGLAS,
Respondent.

BRIEF FOR THE RESPONDENT.

Jurisdiction and Travel of the Case.

This action at law, commenced in the District Court for the District of Massachusetts, comes before this Court upon certiorari to the Circuit Court of Appeals for the First Circuit. The writ is dated November 9, 1933, and names $20,000. as the ad damnum. The petitioner demurred to the declaration on the ground that the District Court had no jurisdiction, because the amount in controversy did not exceed $3,000. exclusive of interest and costs. The District Court sustained the demurrer; its opinion (R. 9, 10) is not reported. The Circuit Court reversed the judgment of the District Court; its opinion (R. 11, 17) is reported in 78 F. (2d) 829. This Court granted petition for certiorari on December 23, 1935 (R. 29).

Although the ad damnum in the respondent's writ was $20,000., and although the amount sought in good faith in the declaration as damages was about $17,308., the District Court nevertheless sustained the demurrer and entered judgment for the petitioner. This judgment was properly reversed by the Circuit Court of Appeals. The question of jurisdiction could not be adjudicated by the demurrer, for the amount claimed in good faith established jurisdiction, and not the possible amount of ultimate recovery. As was well stated in the case of *Kimel* v. *Missouri State Life Ins. Co.*, 71 F. (2d) 921:

> "Amount demanded by the plaintiff in petition, when not fictitious or merely colorable but claimed in good faith, and not amount of ultimate recovery, is test for determining whether case involves requisite jurisdictional 'amount in controversy'."
>
> *Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22.

The demurrer should have been overruled on this ground, therefore, if not on the substantive questions of law hereinafter considered.

Additional Facts of the Case, and Question Presented.

The facts of the case, as admitted by the demurrer, are fully set out in the respondent's substitute declaration (R. 3, 7). Respondent respectfully invites the Court's attention to the following important allegations:

This action was commenced November 9, 1933. Prior thereto, to wit, August 11, September 11, and October 11, 1933, the insurance company refused and failed to pay respondent the $20. per month benefits due him under the disability clauses of the policy (R. 20). On August 7, 1933, the company also failed to waive the payment of the semi-annual premium that fell due, and on September 19, 1933, it declared the policy *unconditionally* lapsed on its records. The declaration further alleges that the respondent (plaintiff be-

low) lost the total and irrecoverable use of one hand and one foot—this condition under the policy is recognized to constitute total disability for life; and further, that he was no longer an insurable risk.

The question presented, therefore, is decidedly different from the one considered by this Honorable Court in the case of *Mobley* v. *New York Life Insurance Co.*, 295 U.S. 632. It is as follows: Where a life insurance company has repudiated its obligation to pay to the insured, who is totally and permanently disabled, and who is no longer an insurable risk, benefits due him under the contract, has in fact refused to pay three monthly benefits already due, has failed to waive the payment of premium, and has declared the policy unconditionally lapsed: can the insured treat the contract as ended, and maintain one action for the recovery of all damages for the entire value of the broken contract?

Points and Authorities.

The respondent will direct his argument to the points and authorities considered in the petitioner's brief.

1. *As to the point that: "The case is governed by the decision of this Court in the recent case of Mobley v. New York Life Insurance Company, 295 U.S. 632."*

The pertinent facts stated in this Court's opinion, relied on as showing a total breach in the *Mobley Case*, are not as petitioner sets them out in its brief. They may be summarized as follows:

Mobley became disabled sometime in January, 1931, when the company commenced paying him benefits under two policies. Several times between June 13, 1931, to March 1, 1933, the company concluded that Mobley was not totally disabled, and on each occasion notified Mobley that it would discontinue payments and would not waive premium. But in every instance, on his insistence that he was disabled, the company made further investigation and then changed its ruling, paid past benefits, resumed monthly benefits and waived premiums. On March 1, 1933, the company wrote him that in its opinion he was not totally disabled and that

it would not make payments, and that the premium due February 7, 1933, became payable. Mobley replied he would take legal steps. On March 9, company wrote that the matter was receiving further consideration. On same day Mobley demanded $28,980. as total breach of the contracts and threatened suit. On March 17, company wrote that it would adhere to its decision not to make further payments. On April 13, company wrote him that one policy lapsed for non-payment of premiums, and urged Mobley to apply for reinstatement to protect his interests. On June 5, it advised him that since he had not applied for reinstatement, the company applied the value of the policy to purchase continued insurance until June 20, 1937. On June 9, notice was given him that premium on the other policy would be due on July 9. On July 8, attorney for Mobley wrote to the company that Mobley did not approve of the company's action of June 5. In answer the company wrote that it would give the claim further consideration and a new medical examination was made on July 24. As a result, the company concluded that Mobley was totally disabled and on August 9, tendered him $910. accrued benefits, and written waiver of premiums. On July 24, suit was begun on one policy, and a few days later on the other. The company pleaded the correspondence and made tender in court. Thereafter, on the 13th of each month, the company made payments in court.

On these facts this Honorable Court ruled that there was no repudiation of the entire contract.

In the instant case, as was well said by the Circuit Court of Appeals "the facts alleged are essentially different from those in the Mobley case . . . . . " (R. 15).

Viglas became totally and permanently disabled on September 11, 1931, and the company paid benefits up to July 11, 1933. On September 1, the company notified him it would not make payment which was due August 11, and that it would not waive the payment of premium due on August 7. Then it failed to make the payment due August 11, September 11, and October 11, and on September 19, it declared the policy as lapsed. Viglas was no longer an insurable risk. On November 9, 1933, he commenced his action for damages.

In the *Mobley* case, the correspondence between the company and the assured, the continuous examination of the assured by the company's doctors, even after lapsation, the invitation on the part of the company to reinstate the policies, the offer on the part of the company to pay accrued benefits, and to waive the payment of premiums, conclusively establish the fact that the company did not intend to terminate the policy unconditionally and without qualification, but reflect an honest endeavor on the company's part to place the assured in status quo, reinstate the policy, and pay him all accrued benefits.

In the instant case, these facts do not appear at all. After the company failed to make three payments that had fallen due, and after it failed to waive the payment of premium, it unconditionally declared the policy as lapsed, all of which happened at a time when the assured was totally and permanently disabled, and when he was no longer an insurable risk, and before suit was brought. The Court please note that the declaration alleges that the assured had lost the irrecoverable use of one hand and one foot, a condition which is recognized under the terms of the policy to constitute total disability for life (R. 20). That being so, the liability was fixed during the entire life of the assured. What more should the company do in order to show complete disregard and repudiation of the contract?

The petitioner argues that its acts did not amount to repudiation or a total breach of the contract. If that be so, what did such acts amount to? Does lapsation mean an end of the policy, giving the right to the assured to consider it as ended? If the petitioner, therefore, considered the policy at an end by its lapsation of it, how can it now take an inconsistent view and argue that the respondent may recover only the benefits that had accrued or will accrue under the contract, when the contract is at an end? Can it be argued, as the petitioner stresses in its brief, that the lapsation and ending of the contract has no effect on the series of so-called contracts flowing from the policy, and that the same are still alive and suits can only be brought upon them? Either the policy is dead, or it is alive. It has either died by the lapsation and as

a consequence suit may be brought for its breach, or it is still alive in spite of the lapsation and ending of it by the company, and suits for the collection of each monthly benefit must be brought under it. If the question were put to the petitioner as to what it meant by the lapsing of the policy, certainly the only answer it could give was that the policy was at an end, and that the company was no longer liable upon it. Certainly they did not intend that it would not lapse; that being so, respondent is entitled to treat the policy as at an end, and sue for full damages arising from such breach.

In *Robins* v. *Travelers Insurance Co.* (February, 1934) 269 N.Y.S. 841, it was held that where disability insurer repudiated its contractual obligation to pay disability benefits, some of which had already accrued, insured was entitled to treat the contract as ended, and maintain a single action immediately to recover all damages occasioned by such breach, the Court observing, "in the present case there is more than repudiation before maturity because defendant has definitely breached the contract by refusing to pay disability benefits already due . . . . . Here benefits are due and repudiation would force plaintiff to resort to repeated law suits."

Equitable Life Assurance Society v. *Pool*, 71 S.W. (2d) 455, (Ark., 1934).

Millbum v. *Royal Union Mutual Life*, 234 S.W. (Mo.) 378.

Minn. Mutual Life v. *Marshall*, 79 Fed. (N.D.) 977.

Indiana Life Endowment Co. v. *Reed*, 103 N.E. (Ind.) 77.

These decisions, and those hereinafter cited in answer to the second point raised in the petitioner's brief, all rest on sound judgment and equity, in that, if in accordance with the uniformity of decisions, contracts of insurance ought to be construed in a light most favorable to the insured, why should the burden be placed upon the insured and not upon the insurer? For in these cases, the insurer, by some alleged claim that in its judgment the insured is not totally disabled, loses nothing by refusing to make payments and waive premium.

The insured, who may be totally and permanently disabled, in order to safeguard the policy from ending by lapsation, must on one hand pay premiums under protest, and on the other, must bring law suits every month and prove his disability in every case in order to collect every monthly installment through a court trial. Meantime, his mind is disturbed, he cannot pledge the policy to borrow any money if he needs it, he stands a chance of losing important witnesses if he has to sue every month during the life of the policy, and he is thereby completely at the mercy of the insurance company. The company has nothing to lose, but the insured has everything at stake, although he has neither breached his contract nor has he in any way disavowed it. If, in his honest opinion, the insured should feel that he is totally disabled and thereby does not pay the premium under protest to prevent the policy from lapsation, and it should later be proven at a trial that he was not in fact totally disabled within the meaning of the policy provisions, it would be absolutely impossible for him to reinstate his policy if he be not a proper insurable risk. His policy is thereby at an end. However, it is strenuously argued by the petitioner that if the insurance company lapses the policy and its judgment is found to be mistaken, its act of lapsation is nugatory and the insurance company should suffer no hardship of any nature.

Take for example, the present case. If at the trial on the merits, the respondent, who honestly believes in his total disability, should fail to prove that as a fact, in accordance with the provisions of the policy, he is absolutely deprived of the policy by the lapsation, and it is at an end and he has no remedy whatever under the policy, except perhaps to petition for reinstatement provided he is an insurable risk. In this case it is alleged and admitted by the demurrer that the respondent is not an insurable risk, and consequently his policy must be declared at an end. The petitioner argues that this result should not obtain as against it, in spite of the fact that it proceeded to lapse the policy unconditionally. Law and justice requires that if both parties are to be treated equally, and if their acts and omissions are to be given the same weight, they should suffer the same consequences. If the in-

surance company does not desire the insured to recover in one action all damages flowing from the repudiation of the policy, its only course is either to waive the payment of premium under protest and thereby not lapse the policy, or lapse the policy on condition that the same be reinstated if the company's judgment is in error.

2. *As to the point that: "The doctrine of anticipatory breach which alone could sustain the respondent's position, does not apply to the case."*

Respondent agrees with learned counsel for petitioner that the doctrine of anticipatory breach does not apply to this case. The opinion of the Circuit Court of Appeals, in a most clear and logical manner, discusses the principles which govern the case at bar (R. 11, 17). The case belongs to that class of cases governed by the rule of law which may be stated as follows: Where time for performance by the defendant has arrived, and there is a present breach and a complete repudiation of the entire contract, it warrants the assessment of damages equivalent to the value to the plaintiff of the broken contract.

Pierce v. *Tenn. Coal, Iron, etc. Co.*, 173 U.S. 1.
Lovell v. *St. Louis Mutual Ins. Co.*, 111 U.S. 264.
Dunbar v. *Dunbar*, 190 U.S. 340.
Parker v. *Russell*, 133 Mass. 74.
Central Trust Co. of Ill. v. *Chicago Auditorium Ass'n.*, 240 U.S. 541.
Day v. *Conn. General Life Ins. Co.*, 45 Conn. 480.
Indiana Life Endowment Co. v. *Reed*, 103 N.E. 77.
O'Neil v. *Supreme Council American Legion of Honor*, 57 Atlantic (N.J.) 463.

In the case of *Federal Life Insurance Co.* v. *Rascoe*, (C.C.A. 6), 12 F. (2d) 693, in which, certiorari was denied, 273 U.S. 722, and in which full damages were recovered, the Court said:

"This is a single contract. The fact that the defendant is required to perform in part at stated intervals does not

> change its unitary character into a multiplicity of contracts, each relating to but one installment. If there has been an actual breach, coupled with repudiation, of this one contract, then, to avoid a multiplicity of suits, public policy requires that plaintiff may maintain but one action for the entire damages occasioned by such breach."

In *Pierce* v. *Tenn. Coal, Iron, etc. Co.*, supra, repudiation by the defendant of an agreement by it to pay the plaintiff, who had been injured, stated monthly payments as long as his disability should continue, coupled with nonpayment of sums due, was held to warrant the assessment of damages equivalent to the value to the plaintiff of the broken contract. Quoting from the language of Justice Gray:

> "The defendant committed an absolute breach of the contract at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death, but he has the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future as well as in the past if the contract had been kept. In so doing he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract."

In the instant case, liability became fixed to pay respondent monthly benefits for the rest of his life, for he alleges, in addition to his other disabilities, that he lost the total and irrecoverable use of one hand and one foot. This allegation is admitted by the demurrer. The policy provides (R. 20), "The total and irrecoverable loss of sight of both eyes or of the use of both hands or of both feet, or of one hand and one foot, shall constitute total disability for life." The petitioner failed to make three monthly payments and also to waive the premium at a time when the respondent was entitled to re-

quire performance. Then it unconditionally lapsed the policy. The respondent was not bound to wait to see if the petitioner would change its decision and pay the installments that had fallen due, and reinstate the policy; or to resort to successive actions for damages from time to time. However, he had the right to elect to treat the contract as absolutely and finally broken by the petitioner; to maintain his action once and for all, as for a total breach of the entire contract; and to recover all that he would have received in the future as well as in the past, if the contract had been kept.

Eastern Tenn. etc. R.R. v. *Taub*, 7 Lea. 397.

Cutter v. *Gillette*, 163 Mass. 95.

Anson on Contracts, Am. Ed. Ch. XV, pp. 442, 445.

Restatement Law of Contracts, Am. Law Institute, Rep. Samuel Williston. Tentative Draft No. 7, explanatory notes on contracts March 1, 1930, 14 Harvard Law Review 432.

In *Dunbar* v. *Dunbar*, cited supra, the contract was to pay a divorced wife, "during her life or until she marries for her maintenance and support, yearly the sum of $500.". It was held that a discharge in bankruptcy did not discharge the husband from installments falling due after the bankruptcy; on the grounds that the wife's claim for such payments was not provable in bankruptcy because of the impossibility of calculating the continuance of widowhood so as to base a valuation upon it. Bankruptcy was considered a breach of the contract. If the duration of widowhood could be figured like the expectancy of life from death mortality tables, the inference to be drawn from the decision is that the Court would have said that the claim was provable in bankruptcy for a liquidated amount. This case is analogous to the case at bar, with the exception that in the instant case the expectancy of life of the respondent is ascertainable, whereas in the *Dunbar* case the duration of widowhood was not.

The petitioner in its brief argues that "lapse signifies termination of the policy in accordance with its provisions,

not repudiation which would terminate the contract contrary to its provisions." It is agreed that lapse signifies termination of the policy in accordance with its provisions, but such termination was brought about by the wrongful failure on the part of the petitioner to waive the payment of premium in accordance with the provisions of the policy, and at a time and under circumstances when the respondent was entitled to require performance. If the termination of the policy through lapsation, therefore, was brought about by this wrongful act of the petitioner, certainly the petitioner would not argue that such termination of the contract is not putting it to an end. What then does termination mean? Under these circumstances it means repudiation of the contract.

In *Parker* v. *Russell*, cited supra, failure by the defendant to make any payments for about two years on a contract to support the plaintiff during the latter's life, was held to warrant a finding that the entire contract was broken and assessment of damages equivalent to the value of the contract to the plaintiff.

It is respectfully submitted that the principle of the foregoing decisions is applicable to the case at bar.

3. *As to the point: "Aside from the rules of law heretofore discussed, it would be unjust to permit the recovery sought by the respondent."*

The petitioner argues at length that unless the opinion of the Circuit Court is reversed, it will mean a great hardship on insurance companies. What about the great hardship on the insureds in cases like the present, where the companies refuse to make payments and lapse policies? Must the insured be left to pursue his just claim by a multiplicity of suits? It is argued, in behalf of the petitioner, that it never agreed in the policy to pay a lump sum, and further that what it agreed to do and what the assured bargained for, was that it should make payments monthly. That is quite correct, so long as the bargain is kept up, and no wrongful withholding of payments when they fall due is made, and no lapsation of the policy is decreed by the company. There is no sound reason, however, when the insurer has wrongfully violated the

provisions of the policy and has lapsed the same, why the insured should be left to the only remedy of suing monthly for that which is due him. By being placed in a position where his mind is disturbed through litigation, he stands the chance of losing important witnesses; and while he is in the destitute condition of being totally and permanently disabled, he is thus indirectly placed at the mercy of the insurance company.

In answer to the lengthy argument advanced by the learned counsel of the petitioner on this point, the Court please consider also that usually the insured who is totally and permanently disabled comes from the walks of life of the worker, the humble, and the poor, and faithfully expects the monthly payment under his policy for his maintenance and support, and for the maintenance and support of his loved ones. He can perform no work, for he suffers from illness, and is of total inability to do anything. While in that state of mind and suffering, the insurance company decides to stop the payments, and calls upon him for premium. Usually he is not in a position to even pay premium under protest, and the policy lapses. If he desires to enforce payments, he must bring suit to collect the monthly benefit; he must engage counsel, he must produce witnesses and medical men in court, and if the company should refuse every month to make the payment due, he must repeat this in every instance. The company has nothing to lose, but insured has everything destroyed. Why should he be deprived of his right to collect in one sum the damages that he is entitled to, if the company wrongfully lapses the policy? It is argued, in behalf of the petitioner, that there is no practical convenience in allowing such a recovery, and that justice does not require that a plaintiff have this novel remedy. In answer, we respectfully submit that justice not only requires but necessitates that such a remedy be extended for the relief of the insured, and that such remedy is not novel, but is founded on fundamental principles of law and equity.

It is further argued, on behalf of the petitioner, that damages are speculative and conjectural. If damages flowing from the breach of this contract can be termed as resulting

from "a prophecy", then all damages in every case of tort or contract can be given the same stigma of uncertainty. The objections to damages argued in the petitioner's brief may be said to apply to all forms of damages, yet the recovery of such damages is necessary and desirable in order to end litigation, and once and for all give to the one who has been wronged what he has suffered or would suffer. Practical necessity requires that the Court apply the rule laid down in *Pierce* v. *Tenn. Coal, Iron etc., Co.* and *Parker* v. *Russell,* cited supra, to the case at bar. If, as the petitioner argues, the matter would result in great practical hardship for it, the only answer to that is that they should not lapse policies unconditionally, and thus throw all the burden, inconvenience, and worry upon the destitute insured at a time when he is totally and permanently disabled, and when he is no longer an insurable risk. The matter was just as important in 1926, when the case of *Federal Life Insurance Co.* v. *Rascoe,* supra, was decided, as it is today, yet in that case this Honorable Court denied a petition for writ of certiorari.

Respectfully submitted,

HARRIS J. BOORAS,
Boston

GEORGE C. ELIADES,
Lowell

JOHN A. EDGERLY,
Of Counsel,
Boston

Attorneys for Respondent.